

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7270

Joint Petition of Verizon New England, Inc., d/b/a)
Verizon Vermont, Certain Affiliates Thereof, and)
FairPoint Communications, Inc. for approval of an)
asset transfer, acquisition of control by merger and)
associated transactions)

Order entered: 4/27/2007

PROTECTIVE ORDER REGARDING FAIRPOINT PREFILED TESTIMONY

I. INTRODUCTION

On March 23, 2007, FairPoint Communications, Inc. ("FairPoint") filed a Motion for Confidential Treatment of Prefiled evidence concerning portions of the prefiled testimony of FairPoint witnesses Walter E. Leach, Jr. and Michael J. Balhoff. FairPoint argues that the redacted passages in the prefiled testimony and exhibits include information that is competitively sensitive and should be maintained as confidential. FairPoint submitted averments to support its request for confidentiality. No other party opposed FairPoint's motion or filed comment.

II. THE PREFILED TESTIMONY

According to his prefiled testimony, Mr. Walter Leach is responsible at FairPoint for all aspects of the merger and for strategic planning. His testimony presents an overview of the financial transaction and discusses the new company's capital structure as well as whether FairPoint can generate sufficient cash to operate. Mr. Leach also discusses FairPoint's five-year plan as well as a summary income statement, a calculation of cash flows, a summary balance sheet, an analysis of key credit ratios, margin and growth analysis, and details regarding capital expenditures and other assumptions.¹ However, all of this testimony, which is contained on pages 20 through 34, and all of the associated exhibits, have been redacted and are proposed to be treated as confidential. When Mr. Leach's public testimony resumes on page 34, he concludes

1. Leach pf. at 19.

that "the ratios and balance sheet are strong indicators that the company will remain financially stable for the foreseeable future."² Mr. Leach also testifies that Verizon's plant will be taken over at book value, although he never states that value.³ He also projects that FairPoint will be able to "generate significant Free Cash Flow and will be able to attract additional capital, if necessary."⁴ Mr. Leach then discusses synergies to be generated by the merger. He states that the merger will generate \$60 to \$75 million in "operating efficiencies," but he redacts a statement about when these efficiencies will be realized.

Mr. Michael Balhoff has prefiled testimony for FairPoint as an expert on acquisitions. He concludes that FairPoint's cash flow assumptions are reasonable and indicate that FairPoint will be able to make the investments it is promising. Mr. Balhoff's testimony redacts several items, including projections of FairPoint's planned capital expenditures,⁵ a table listing FairPoint's planned capital expenditures,⁶ and all discussion of FairPoint's five-year financial projection model.⁷ Pages 18 through 25 of his testimony are totally redacted. Mr. Balhoff concludes that the model "reflects reasonable or even conservative industry trends, margins, and capital commitments,"⁸ and that FairPoint can generate "incremental cash flows" beyond those anticipated in the model.⁹

III. DISCUSSION

To promote full public understanding of the basis for its decisions, this Board has actively taken steps to limit the amount of information subject to protective orders. We have encouraged parties to remove material from that protection to the extent possible. Since 2001, we have required petitioners seeking a protective order to submit a document-specific (or information-specific) averment of the basis for keeping confidential any document (or information) that they wish to be kept under seal. This arrangement appropriately places a heavy burden on the party

2. Leach pf. at 34.

3. Leach pf. at 35.

4. Leach pf. at 35.

5. Balhoff pf. at 11.

6. Balhoff pf. at 12.

7. Balhoff pf. at 16.

8. Balhoff pf. at 17.

9. Balhoff pf. at 17.

seeking confidentiality to justify that decision. It also ensures that counsel for the party seeking confidentiality has actually reviewed and considered the relevant confidentiality factors, as they relate to the specific document or information at issue.¹⁰ Generally, however, we only resolve disputes about information when there is a genuine disagreement about its confidential nature.¹¹

In determining whether to protect confidential information, we consider three issues:

- (1) Is the matter sought to be protected a trade secret or other confidential research, development, or commercial information which should be protected?
- (2) Would disclosure of such information cause a cognizable harm sufficient to warrant a protective order?
- (3) Has the party seeking protection shown "good cause" for invoking the board's protection?¹²

FairPoint argues that all of the above-described materials comprise "forward-looking statements" that the company, which is publicly traded, "does not and has not provided to the public or to individuals outside the [c]ompany."¹³

We have reviewed the motion and supporting materials, and we have applied the existing standard. We conclude that the redacted information is commercial information that should be protected, that disclosure would cause a cognizable harm sufficient to warrant a protective order, and that there is good cause for protecting the information. Therefore, FairPoint has made a *prima facie* showing that confidential treatment is warranted for the information at issue, and we grant FairPoint's motion for a protective order.

At the same time, we are concerned about the broad scope of FairPoint's redactions from the publicly available testimony. As noted above, this Board has actively taken steps to limit the amount of information subject to protective orders so as to promote a full public understanding of the basis for our decisions. We recognize our legal authority to base our decision on detailed findings that are not made public. However, this should be avoided whenever reasonably

10. *Investigation into General Order No. 45 Notice filed by Vermont Yankee Nuclear Power Corporation re: proposed sale of Vermont Yankee Nuclear Power Station to Entergy Nuclear Vermont Yankee, LLC*, Docket, No. 6545, ("Entergy Docket"), Order of 11/9/01 at 5-6.

11. *Id.* at 6.

12. See, e.g., *Entergy Docket*, Order of 3/29/02 at 2.

13. Motion at 1-2.

possible. Of course our conclusions may be backed up by some supporting information that remain under seal even after a docket concludes. However, except in unusual circumstances, we desire to provide the public with meaningful findings to support our conclusions, and we rely on the parties to bring to our attention circumstances in which public findings will not be even minimally explanatory. Such cases require particularly careful scrutiny of confidentiality claims.

Notwithstanding that much highly relevant testimony will be unavailable to the public, absent objection from the Department of Public Service or another party, we grant FairPoint's motion in full. However, we intend in this proceeding to continue to reevaluate this confidentiality decision and to make public all testimony that does not meet the standard of confidentiality. We anticipate further discussion of this question during hearings. We may decide to direct FairPoint to file revised exhibits that draw closer boundaries around allegedly confidential information that bears on central issues. In addition, we have consistently reminded parties who seek confidential treatment for materials that they have a continuing obligation to reexamine protected information and to release material that would not cause competitive harm, or that has otherwise been made public (even during the course of this proceeding), particularly testimony and exhibits. We expect FairPoint to do the same here.

At this time, we are not explicitly ruling that any specific information should remain confidential indefinitely. Parties retain the ability to challenge whether information encompassed by this ruling should be removed from the special protections we adopt in this Order or removed completely from protection as confidential information.

III. ORDER

Therefore, IT IS HEREBY ORDERED that the Confidential Information provided by FairPoint (as set out in an attachment to this Order) shall be treated in this proceeding as follows:

1. All testimony, affidavits, transcripts, exhibits, and other documents that are subject to this Order as confidential information, and any documents that discuss or reveal documents that constitute confidential material, shall be placed in a sealed record by filing such information in sealed envelopes or other appropriate sealed containers on which shall be endorsed the caption and docket number of the proceeding, the nature of the content (*e.g.*, exhibit, report, etc.), and a statement that it shall not be opened or released from the custody of the Clerk of the Board

except by Order of the Board. Notwithstanding such a statement, the members of the Board, any employee or consultant specifically authorized by the Board to assist the Board in this proceeding, and any Hearing Officer appointed to this Docket may have access to such sealed confidential information, but shall not disclose such information to any person.

2. At hearing or conference in this proceeding, no persons, other than those who have signed or agreed to be bound by this Order and the Protective Agreement approved in the Order of March 28, 2007, and those whom the Board has expressly authorized to have access to this confidential information, shall be permitted to give, hear or review testimony given or held with respect to this confidential information.

3. Each Board stenographer or reporter in this proceeding shall acknowledge and be bound by this Order. Each such Board stenographer or reporter shall be instructed to and shall start a separate transcription for testimony or discussion on the record of confidential information. Such transcription shall be marked "Confidential" and shall be sealed and filed with the Clerk of the Board, and copies of the same shall be made available only to those persons authorized to view such information. Such transcription shall, in all other respects, be treated as confidential information pursuant to this Order.

4. The Board retains jurisdiction to make such amendment, modifications and additions to this Order as it may, from time to time, deem appropriate, including any such amendments, modifications or additions resulting from a motion made pursuant to the Protective Agreement. Any party or other person may apply to the Board for an amendment, modification or addition of this Order.

Dated at Montpelier, Vermont, this 27th day of April, 2007.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: April 27, 2007

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

LIST OF ALLEGEDLY CONFIDENTIAL INFORMATION

Witness	Testimony (page/line), Exhibit	Subject	Related Averment
Leach	Exhibit WL-1	Overview of FairPoint's Financial Projections	1
Leach	20/line 1 34/line 10	Financial model and projection data	1
Leach	36/line 22 37/line 2	Forward-looking statement regarding synergies	1
Balhoff	11/line 14 11/line 17	Financial model and projection data	2
Balhoff	12/line 4 12/line 10	Financial model and projection data	2
Balhoff	16/line 15 16/line 19	Financial model and projection data	2
Balhoff	18/line 1 25/line 3	Financial model and projection data	2